

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
January 23, 2007 Session

**CHRISTOPHER A. DAVIS v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 98-D-2728     Randall J. Wyatt, Jr., Judge**

---

**No. M2005-02145-CCA-R3-PC - Filed July 9, 2007**

---

Petitioner, Christopher A. Davis, appeals the denial of his petition for post-conviction relief. On appeal, Petitioner contends that his trial counsel provided ineffective assistance because he failed (1) to present alibi evidence at Petitioner's trial; (2) to effectively cross-examine witness Jeffrey Todd; (3) to investigate the possibility of an alternative suspect; (4) to call two witnesses who saw two individuals at the scene of the crime; (5) to file a motion to suppress; (6) to adequately consult with Petitioner before and during trial; (6) to move for a severance; and (7) to request a Rule 404(b) hearing regarding certain testimony. Petitioner also argues that the prosecutor engaged in prosecutorial misconduct and challenges the indictment on due process grounds. After a thorough review, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Paul J. Bruno, Nashville, Tennessee, for the appellant, Christopher A. Davis.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; Tom Thurman, Assistant District Attorney General; and Katrin Miller, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Background**

Following a jury trial, Petitioner and his co-defendant, G'Dongalay Parlo Berry, were convicted of first degree premeditated murder and sentenced to life imprisonment. The facts surrounding Petitioner's conviction were summarized by this Court in the direct appeal in *State v. G'Dongalay Parlo Berry and Christopher Davis*, No. M1999-00824-CCA-R3-CD, 2001 WL

1251240 (Tenn. Crim. App., at Nashville, Oct. 19, 2001) *perm. to appeal denied* (Tenn. Mar. 4, 2002) as follows:

On October 17, 1995, the victim, Adrian Dickerson, and her mother, Regina Conley Hockett, went to the Megamarket in the Hickory Hollow area shortly before 7:00 p.m. At trial Ms. Hockett recounted that while she was attempting to purchase airline tickets, the victim had asked for a quarter to use in a bubble gum machine. Explaining that she did not have change at the time but likely would after buying the tickets, Ms. Hockett asked the victim to wait. Thereafter the mother turned back to the counter and did not see her daughter leave the store.

After apparently obtaining a quarter from the family car, the victim was walking back toward the store when a bullet ripped through her neck. She died before emergency personnel could arrive.

Numerous people were present in front of the store or in its parking lot at the time of the shooting, and three were called by the State to testify at trial. Donald Mapes, a part-time Megamarket employee on this date, was taking a break in front of the establishment when he heard a shot, prompting him to run inside the place of business. Mr. Mapes added that he saw a little girl hit the ground though did not notice anyone close to her. Jim Hammett also testified that he had been at Megamarket on the evening in question and that he and several others had exited the store at the same time. While facing the establishment and preparing to enter his car and leave, he heard a shot come from his left. Having seen the victim fall and, again, believing the shot to have come from his left, Mr. Hammett moved to the rear or passenger side of [a] vehicle and crouched behind it for a brief period. He then jumped in his car, drove the short distance to his home, and called the police. Following Mr. Hammett's testimony, the State called Deborah Mitchell. This witness testified that she went to Megamarket to pick up her son, a store employee. While waiting for her son, she noticed "a sort of large" bluish-gray car with a couple of people in the front seat and possibly three or four in the back seat enter the lot. She stated that these individuals were black and that she had heard loud rap music coming from the car. Deciding to enter the store to see what was keeping her son, Ms. Mitchell got out of her automobile. Similarly to Mr. Hammett's vehicle, her car was parked in such a way that its passenger side was closest to the store. She then noticed a scratch/dent low on the automobile's back fender close to the trunk and bent to look more closely at the problem. As she was in the process of standing again, Ms. Mitchell heard a shot to her left, which sounded as if it had been fired "just right behind" or beside her. By her own admission, she did not see the person who fired the shot, but did notice the bluish-gray car to her left afterward. She added that this vehicle subsequently slowly drove from the parking lot.

Providing further information concerning what had transpired on October 17, 1995, were Antoine Kirby and Calvin Carter. Both identified the defendants at trial and stated that the defendant Davis had talked with them about involvement in a street gang known as the Folk or the Gangster Disciples. They further alleged that the defendant Davis invited them to ride in the backseat of the 1980's model gray Cadillac to the Megamarket on the night in question some time after Davis commented about putting the Gangster Disciples on the map.

Through his testimony, Antoine Kirby disclosed that in October of 1995, he had been a fourteen-year-old "Baby Gangster" or "B.G." and had occupied this role for two years selling drugs, counting money, etc. He affirmed that he "was not a true member of the gang," having not qualified for membership; however, in the courtroom he stated that both defendants were Gangster Disciples and distinguished the defendant Davis as the Nashville leader of this gang.

Detailing events leading up to the murder, Mr. Kirby testified that he went to the defendant Davis' apartment shortly after school on that date. While there, he observed the defendants enter a separate room where they remained for around five to ten minutes. Mr. Kirby stated that when the two emerged, the defendant Davis was holding a rifle that looked exactly like the weapon admitted as an exhibit in court, and Davis proclaimed, "I'm going to peel some white folks." Mr. Kirby interpreted "peel" to mean "murder" in this context and stated that thereafter the defendant had selected those to ride with him. Christopher Davis drove, G'dongalay Berry occupied the front passenger seat with the rifle, and the backseat held Jonathan Davis, Calvin Carter, and Antoine Kirby.

Mr. Kirby went on to state that they arrived in the Hickory Hollow area after riding for around forty-five minutes to an hour smoking marijuana blunts soaked in embalming fluid, and listening to loud music. Once they arrived, they drove through a suburban neighborhood and ultimately came to and circled the Megamarket parking lot before stationing themselves toward the back and on the left side of this lot. The defendant Davis parked in a slanted manner with the passenger side of the car closest to the store.

Though acknowledging that the approximate three total hours of smoking the aforementioned marijuana on that evening had impacted his vision, Mr. Kirby related that he saw the defendant Davis then lean over toward the defendant Berry. While Mr. Kirby could not hear over the sound system, he next observed the defendant Davis' lips forming the words, "Go ahead and shoot. Go ahead and shoot." Continuing with this account, Mr. Kirby stated that he was unsure of how many shots had been fired, but he knew that the defendant Berry had aimed in the direction of the store. This witness added that in that direction, he saw a Caucasian lady putting something in or getting something from her trunk while standing approximately thirty

to thirty-five feet from their car. According to Mr. Kirby, the defendant Davis then drove slowly from the lot.

Under direct examination this witness also claimed that the defendant Davis approached him about murdering someone around four months after this event. In exchange for committing this act, Davis reportedly promised to move up the witness' ranking in the gang to foot soldier.

Upon cross-examination Mr. Kirby attempted to explain parts of his behavior; admitted to previously having lied; denied recalling information responsive to numerous questions asked by the defense attorneys; and re-affirmed many of his statements. For example, he testified that he had not been focusing or thinking well when he got into the car that night, but did not believe that anyone was going to be killed: he thought that they would ride around, continue getting high, and maybe go to the movies. Furthermore, he remarked that some of the seeming inconsistencies in his account stemmed from his confusion with respect to the manner in which various questions were asked. However, he did acknowledge that he had lied when first questioned by the police. He also said that one of the investigating detectives had told him that "if I didn't do what I had to do to tell the truth that he would throw a case or something like accessory or something" at him. Nevertheless, the witness then indicated that he had not wanted to go to jail for something that he had not done; thus, he subsequently told the truth. Moreover, while Mr. Kirby agreed that he had forgotten until later Davis' comment about killing white people, he was quite clear that neither the prosecution nor the detectives had suggested the latter to him. Mr. Kirby stated that he simply did not remember immediately all of the details of an event that had happened years ago, but had recalled additional information as he had spent time thinking about that night. In addition, among numerous matters that he denied remembering, this witness claimed that he could not recall talking to a private investigator for the defense and telling this individual that he did not think Berry had anything to do with this shooting. Finally, he re-asserted some of the key factors brought out on direct examination concerning this event, such as the comment about going to peel white people; his having read the defendant Davis' lips; the defendant Berry's having fired in the direction of the Megamarket; and the Caucasian (light-skinned) lady's presence around thirty to thirty five feet from their car in the direction of the store.

Calvin Carter took the stand after Mr. Kirby. On October 17, 1995, Mr. Carter[,] a juvenile[,] went to Mr. Kirby's home after school in search of Mr. Kirby's oldest brother. While Mr. Carter did not find Mr. Kirby's brother, the witness did encounter Davis next door at Davis' grandmother's home. According to the witness, Davis began talking to him about the Gangster Disciples. In the process the defendant Davis indicated that the gang was making money; that he wanted Mr. Carter to join and sell drugs; and that Mr. Carter would not only make money, but

also live longer if he joined. Having at some point traveled from the home of Davis' grandmother to Davis' duplex, Mr. Carter was invited by Davis to go with him, Berry, Jonathan Davis, and Mr. Kirby in the car. According to this witness, Davis asked Berry to ride in the front passenger seat, and when Mr. Carter came to the car, Berry had been carrying a weapon that looked like the one marked as an exhibit at trial. Mr. Carter also testified that once in the car, the group smoked marijuana and drove around for approximately forty minutes before arriving at the Megamarket. At that point Davis turned down the music and announced "we're fixing to do something. Let's skin some white folks;" parked the car on the left side of the lot with the passenger side closest to the store; nodded at the defendant Berry; grabbed the rifle and pointed it out of the window. Mr. Carter also observed Davis say something to Berry around this time. Thereafter, Mr. Carter slid down in the seat, but saw Berry apparently aim the weapon toward the Megamarket and heard the fire. This witness stated that the defendant Davis then drove slowly out of the parking lot, sped away from the scene, and turned the music up loud again. Because he had eased down in the back seat, Mr. Carter saw little else and initially denied knowing that anyone had been killed.

Also during his testimony this witness acknowledged that when the police first approached him regarding this matter, he was in jail for an altercation with his girlfriend, wherein he had told her that he and his friends had killed the victim and that he could have her killed also. And, while he admitted that he would have been in trouble if he told the authorities that he had knowingly taken part in a murder, this witness stated that he had not thought that anyone was going to be shot on that night. Furthermore, Mr. Carter admitted that he had lied to protect himself in his initial meeting with the police as he had told them that he was at the scene in a separate car from the defendants. Still, Mr. Carter contended that when later approached, he told and continued to tell the truth to the best of his ability.

Detective Roland of the Metro Murder Squad Unit testified that the defendant Davis acknowledged his involvement in the Gangster Disciples and drew gang symbols for Roland. In addition, this witness interviewed Berry, who likewise admitted his affiliation with the Gangster Disciples. According to the detective, Berry also talked about the procedure for being admitted into a gang: he told Detective Roland that one of the means by which an individual could become a member was to kill.

Two other Metro detectives, Pat Postiglione and Al Gray, also testified concerning their encounter with these defendants. On February 28, 1996, the detectives went to the duplex rented by Davis and Ronald Benedict. They were invited inside and were speaking with Mr. Benedict and another individual when both defendants and a female arrived. Seeing the officers, these three began to run, and the officers gave chase. In the process, Berry dropped or threw the Chinese SKS

assault rifle with which he had entered. Detective Postiglione secured the weapon which was later given to Identification Technician Earl Hunter. At the time of confiscation, the weapon was loaded with approximately thirty rounds of ammunition, and a subsequent search of Davis' room resulted in the seizure of roughly ninety additional rounds of the same type.

Detective Gray later took this ammunition and weapon to the Tennessee Bureau of Investigation (TBI) lab for testing along with a fragment removed from the victim during the autopsy. There Special Agent Steve Scott examined these items and testified concerning his findings as a firearms analysis and comparison expert. This witness essentially began detailing his analysis by stating that weapons leave a "mechanical fingerprint" on shell casings and bullets used therein. However, he stated that the jacket fragment taken from the victim in this case represented only a small portion near the nose of the bullet. Because it came from this tapered area, the fragment would not have come into contact with the barrel and, therefore, bore no signature markings from a barrel, which could have enabled him to match the fragment to a particular weapon. Yet, he was able to give his opinion that the fragment was consistent with some of the ammunition seized at Davis' residence and was of the type normally fired by the weapon alleged to have been used to kill the victim.

The medical examiner, Detective Gray, and Thomas Haines all identified the entrance and exit wounds, indicating a left to right path of the bullet. Based on his education and experience as a Special Forces Medic and then as a paramedic/EMT for a total of over fourteen years; having received special training in ballistic wounds; and having personally observed around 500 gunshot wounds, Mr. Haines testified that young Ms. Dickerson had "more than likely [been] dead before she hit the ground." Furthermore, he described the size of her wounds and the internal injuries to her neck before stating his belief that a high caliber, high powered rifle was responsible for her wound.

The defendants offered little additional evidence. Berry called only Patrick Welles. This individual stated that he was a private investigator who had attempted to telephone Mr. Kirby about this case. Because no one answered, he left a number at which he could be reached and subsequently received a call from the same number at which he had left the message: he believed the individual on the other line was Mr. Kirby. According to Welles, the caller stated that he did not believe that the defendant Berry had been involved in the victim's murder. Thereafter, Davis offered a stipulation concerning the observations of two unavailable witnesses. Had she been present at trial, Sandra Haines allegedly would have stated that she saw a five-foot-ten black male crouching between cars in the Megamarket parking lot at the time of the murder: this man then entered a two door gray or silver car, possibly a Chevrolet Cavalier. Additionally, the stipulation provided that Laura Hickman would have said

that she saw a five-foot-ten to five-foot-eleven, twenty-year-old black male wearing shoes, light colored pants, and a dark sweatshirt at the scene of the crime. Additionally, she allegedly would have also testified that this individual had left in a red car.

## **II. Post-Conviction Hearing**

The State released Laurel Hickman-Shetler and Sandra Haynes from their respective subpoenas prior to Petitioner's trial. At Petitioner's trial counsel's request, the parties entered into a stipulation as to what these witnesses' testimony would have been had they testified. At the post-conviction hearing, Ms. Hickman Shetler, a cashier at Megamarket, testified that she was sitting outside the store on a bench when the shooting occurred. Ms. Hickman-Shetler heard what sounded like firecrackers from her right. She observed a man walking in between the parked cars in the store's parking lot. The man was wearing light pants and a dark sweatshirt. Ms. Hickman-Shetler saw a dark, four-door car "peel out" of the parking lot and travel down the hill. On cross-examination, Ms. Hickman-Shetler acknowledged that she did not see the shooter and did not see from which direction the shots were fired.

Ms. Haynes testified at the post-conviction hearing that Ms. Hickman-Shetler ran into the store and said that someone had been shot in the parking lot. Ms. Haynes went outside and observed someone crouched down between the parked cars. Ms. Haynes was only able to see the individual's blue jeans and white tennis shoes. She was aware that a vehicle left the parking lot after the shooting but was unable to describe the make and model of the vehicle.

Dimitrice Martin, Petitioner's girlfriend, was living in Dickson, Tennessee at the time of the shooting. Ms. Martin testified that Petitioner came over to her house on the afternoon of the shooting. Ms. Martin said that she and Petitioner shopped for awhile, then returned to Ms. Martin's house where they ate dinner and watched television. Ms. Martin and Defendant watched a news report on television that evening about the shooting at the Megamarket. Ms. Martin said that Petitioner left her house the following morning.

Ms. Martin stated that both Petitioner's counsel and the State contacted her lawyer about testifying for the defense. Ms. Martin said that she told the investigating officers that Petitioner was with her the night of the shooting, and that neither one of them knew anything about the incident. On cross-examination, Ms. Martin said that she became a member of the Gangster Disciples a few months after Petitioner was arrested. Ms. Martin received several letters from Petitioner while he was incarcerated, and Petitioner asked her not to testify. Ms. Martin said that she told Petitioner's trial counsel that she did not want to testify, and she told the prosecutor that she did not know anything about the shooting.

Willie Womack testified that he sold an 1985 maroon Cadillac to Petitioner, but he could not remember when the transaction occurred. The vehicle was not operable, and Mr. Womack and Petitioner's uncle pushed the vehicle to Petitioner's grandmother's house. Dennis Menzies testified

that he bought an impounded Cadillac from the Metro Nashville Police Department on August 9, 1995. Mr. Menzies said that he never loaned the car to Petitioner and did not know Petitioner. The State agreed to stipulate that Petitioner's mother's Cadillac was towed and sold at the impoundment lot to Mr. Menzies prior to the commission of the crime.

Detective Pat Pestiglione acknowledged on direct examination that he searched Petitioner's bedroom in a residence on Herman Street without a search warrant, and the search revealed the presences of several weapons and some ammunition. Detective Pestiglione stated during cross-examination, however, that Petitioner told the officers that he did not live in the house, and the owner of the residence subsequently gave his written consent to the search.

Petitioner testified that he was at Ms. Martin's house on the evening of the shooting, and he saw a news report about the incident while watching television with Ms. Martin. Petitioner said he arrived at Ms. Martin's house between 3:00 p.m. and 4:00 p.m. on the afternoon of the shooting, but he could not recall when he left. Petitioner told his trial counsel about his alibi, and trial counsel told him that "it didn't matter," because Dickson was only forty-five minutes away from the scene of the shooting.

Petitioner acknowledged that he bought the inoperable maroon Cadillac from Mr. Womack, and that he bought a stolen gray Cadillac from Jeffery Todd. Mr. Todd removed the VIN and steering column off the maroon Cadillac and placed the items in the gray Cadillac. Petitioner titled the gray Cadillac in his mother's name. Petitioner stated that the Metro Police Department impounded the gray Cadillac prior to the shooting.

Petitioner testified that at the time of the shooting, he lived on Herman Street with Ms. Martin, Ronald Benedict, and Mr. Benedict's girlfriend, Maquanna. Petitioner and Ms. Martin shared a bedroom. Petitioner said that the investigating officers asked for his consent to search his bedroom, but Petitioner refused.

Petitioner said that his trial counsel did not ask him if he wanted a change of venue for the trial. Instead, trial counsel simply told him that the trial court was conducting a hearing on the issue. Petitioner stated that trial counsel never listened to his thoughts about the conduct of the trial, and trial counsel did not investigate any theories of defense.

On cross-examination, Petitioner said that he did not testify at trial because there were no defense witnesses to corroborate his alibi. Petitioner was not aware that Ms. Martin had told the prosecutor that she did not know anything about the case. Petitioner told trial counsel that he had gotten a traffic ticket in Dickson on the day of the shooting, but trial counsel could not find a record of the ticket. Petitioner conceded that the traffic ticket was not issued in his name, and the ticket was issued under "[w]hatever alias [he] came up with at the time." Petitioner insisted that he wanted to be tried by a Davidson County jury for the shooting at the Megamarket, but he conceded that his trial in Davidson County on other murder charges resulted in the imposition of the death penalty.



Jeffery Todd testified at Petitioner's trial. At the post-conviction hearing, Mr. Todd said that he remembered that Petitioner had one gray Cadillac because he had put a steering column in the vehicle. Mr. Todd acknowledged that the steering column was from the maroon Cadillac. Mr. Todd identified a signature on an "affidavit" as his but maintained that the wording in the body of the paper had been altered. Petitioner's uncle brought Mr. Todd the paper to sign. On cross-examination, Mr. Todd said that he had received a letter from Petitioner after the conclusion of the trial in which Petitioner told Mr. Todd to recant his trial testimony. Mr. Todd said that he testified truthfully at Petitioner's trial.

Petitioner's trial counsel testified that he had practiced law over thirty years, and eighty percent of his practice was devoted to criminal matters. Trial counsel stated that the search of the Herman Street residence was initiated in connection with an unrelated murder that had occurred near Tennessee State University. Evidence procured during this search was used in the prosecution of the Megamarket shooting as well as an unrelated matter involving victims, Gregory Evans and D'Angelo Lee, which resulted in Petitioner's convictions of two counts each of first degree premeditated murder, especially aggravated kidnapping, and especially aggravated robbery and the imposition of the death penalty. *See State v. Davis*, 141 S.W.3d 600 (Tenn. 2004). Trial counsel said that a motion to suppress evidence retrieved during the Herman Street search was unsuccessfully argued in the capital case involving the shooting deaths of Mr. Ewing and Mr. Lee. The trial court denied the motion in that case on the basis of Petitioner's disavowal of any ownership interest in the Herman Street residence, and Mr. Benedict's subsequent consent to search the premises.

Trial counsel said that he reviewed all of the State's evidence in the case. Petitioner told trial counsel that he was with Ms. Martin on the night of the Megamarket shooting. Trial counsel tried to find a record of Petitioner's traffic ticket in both Dickson and Nashville, but he was unsuccessful. Trial counsel spoke to Ms. Martin by telephone about Petitioner's alibi. When subsequent information conflicted with Ms. Martin's proposed testimony, trial counsel made a tactical decision not to subpoena her to testify.

Trial counsel said both he and the prosecution were aware that Petitioner's mother's car had been sold prior to the shooting and did not believe that the information was relevant. Trial counsel was not aware until the trial that Ms. Haynes and Ms. Hickman-Shelter had been released from their subpoenas. Trial counsel stated, however, that their stipulated testimony was more favorable to Petitioner than the testimony presented at the post-conviction hearing. Trial counsel discussed requesting a change of venue with Petitioner and did not remember Petitioner voicing any objection to such a request. Trial counsel observed that the Megamarket shooting had been highly publicized in Davidson County. Trial counsel said Petitioner's co-defendant filed a motion to sever which was denied by the trial court. Trial counsel said that he did not request a Rule 404(b) hearing concerning Antoine Kirby's testimony about a subsequent solicitation by Petitioner to commit murder, but trial counsel did object to the testimony, and his objection was overruled.

On cross-examination, trial counsel acknowledged that the investigating officers had interviewed Thomas Michael Johnson in connection with the killing, and that Mr. Johnson's

polygraph results were “questionable.” Trial counsel said that he did not investigate Thomas Michael Johnson as a potential suspect in the case. Trial counsel said there was no evidence that Mr. Johnson had possession of a weapon of the same make and model as the murder weapon or that he was at the scene of the crime.

### **III. Ineffective Assistance of Counsel**

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given were below “the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 23 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies “actually had an adverse effect on the defense.” *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). The error must be so serious as to render an unreliable result. *Id.* at 687, 104 S.Ct. at 2067. It is not necessary, however, that absent the deficiency, the trial would have resulted in an acquittal. *Id.* at 695, 104 S.Ct. at 2067. Should the petitioner fail to establish either factor, he is not entitled to relief. Our supreme court described the standard of review as follows:

Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

*Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996).

The petitioner bears the burden of proving his allegations by clear and convincing evidence on claims of ineffective assistance of counsel. T.C.A. § 40-30-210(f). The findings of fact made by the post-conviction court are conclusive and will not be disturbed unless the evidence contained in the record preponderates against them. *See Fields v. State*, 40 S.W.3d 450, 457 (Tenn. 2001). The petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn.1999). When reviewing the application of law to the post-conviction court’s factual findings, our review is de novo, and the post-conviction court’s conclusions of law are given no presumption of correctness. *Fields v. State*, 40 S.W.3d at 457-58; *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

#### A. Failure to Present an Alibi Defense

Petitioner argues that trial counsel's performance was deficient because he did not file a notice of alibi defense or call Ms. Martin as a witness at trial. Trial counsel testified that he was aware that Ms. Martin had stated that Petitioner was with her the night of the shooting, but he said that further investigation produced information which conflicted with Ms. Martin's proposed testimony. Moreover, Ms. Martin told trial counsel that she refused to testify. Trial counsel sought in vain for the traffic ticket in Petitioner's name which would place him in Dickson at the time of the shooting. Based on the foregoing, trial counsel stated that as a matter of trial strategy, he did not feel it prudent to place Ms. Martin under subpoena without corroborating evidence. The evidence does not preponderate against the trial court's finding that trial counsel's "decision not to call Ms. Martin to testify, or present any alibi evidence, was a tactical decision which the Court will not second guess." See *Cooper*, 847 S.W.2d at 528 (concluding that "tactical choices made by counsel are given deference and the courts must not measure trial counsel's deficiency by '20-20 hindsight'"). Petitioner is not entitled to relief on this issue.

#### B. Failure to Cross-Examine and Impeach Mr. Todd's Testimony

Petitioner argues that trial counsel's assistance was deficient because he failed to effectively cross-examine Mr. Todd at trial or impeach his testimony. At trial, Mr. Todd testified that in September or October, 1995, he took the steering column out of a maroon Cadillac and installed it in Petitioner's gray Sedan DeVille Cadillac. Mr. Todd said that Petitioner also drove a second gray Cadillac which belonged to his mother. Petitioner introduced an "affidavit" as an exhibit to the post-conviction hearing which purportedly recanted Mr. Todd's trial testimony that Petitioner drove two gray Cadillacs. Mr. Todd testified at the post-conviction hearing that Petitioner's uncle brought him the paper to sign, and the language in the body of the paper was altered after he signed it. The post-conviction court specifically credited Mr. Todd's testimony that he had testified truthfully at Petitioner's trial, and the evidence does not preponderate against this finding. Petitioner is not entitled to relief on this issue.

#### C. Failure to Investigate an Alternative Suspect

Trial counsel testified that he was aware that the investigating officers had interviewed Thomas Michael Johnson in connection with the Megamarket shooting, and that his responses during a polygraph test were questionable. Trial counsel said that according to the pre- and post-testing interviews, Mr. Johnson, a chronic alcohol abuser, could not actually remember where he was on the night of the shooting. The investigating officers were unable to determine that Mr. Johnson owned a weapon of the type used in the shooting. Moreover, trial counsel said that Mr. Johnson lived some distance from the Megamarket, and there was no evidence placing him at the scene of the crime. Petitioner offered no proof at the post-conviction hearing that Mr. Johnson was involved in the Megamarket shooting. Based on our review, we conclude that Petitioner has failed to show that he was prejudiced by trial counsel's tactical decision not to pursue Mr. Johnson as a possible suspect. Petitioner is not entitled to relief on this issue.

#### D. Failure to Call Ms. Haynes and Ms. Hickman-Shelter as Witnesses

At trial, the parties agreed to stipulate as to the testimony Ms. Haynes and Ms. Hickman would have presented if called as witnesses as follows:

Ms. Sandra Haynes, who was inside the Megamarket at the time of the shooting, would state that when she came outside, she saw a male black, 5'10", crouching and moving between cars in the parking lot. She stated that he got into a gray or silver, two-door car. She stated that [the vehicle] was possibly a Chevrolet Cavalier.

Witness No. 2, Ms. Laura Hickman, would state that when she came back out of the store where she had run after hearing a pop, she saw a male black, 5'10" to 5'11", twenty, in a dark sweatshirt, light-colored pants, shoes, getting into a red car.

The stipulation was introduced as an exhibit at trial.

Trial counsel testified that the stipulated testimony was more favorable to Petitioner than the testimony presented by these witnesses at the post-conviction hearing. Although Petitioner alleges that trial counsel failed “to present all of the information such persons had to the jury,” he does not suggest what that information might be. Based on our review, we conclude that Petitioner has failed to show that he was prejudiced by trial counsel’s failure to subpoena these witnesses to personally testify at trial. Petitioner is not entitled to relief on this issue.

#### E. Failure to File a Motion to Suppress

Petitioner argues that his trial counsel provided ineffective assistance when he failed to file a motion to suppress the bullets and weapons found in Petitioner’s bedroom in the residence on Herman Street. Petitioner testified at the post-conviction hearing that he lived at the Herman Street residence and paid all the bills associated with running the residence. Petitioner contended that the search was illegally conducted without his consent.

Trial counsel said that a motion to suppress the evidence found at the Herman Street residence was filed and argued in the capital case involving the killing of Mr. Ewing and Mr. Lee. The trial court denied the motion, finding that Petitioner lacked standing to challenge the search based on his disavowal of any possessory interest in the Herman Street residence, and that Ronald Benedict consented to the search making the procurement of a search warrant unnecessary. The trial court found that after Petitioner was arrested and read his *Miranda* rights,

Detective Bill Pridemore requested consent to search the bedroom where the rifle had been observed. According to Detective Pridemore, [Petitioner] denied staying in the bedroom and also denied any knowledge of any items that might be located in the room. Detective [Al] Gray confirmed [Petitioner’s] statement. Based on [Petitioner’s] response, Detective Pridemore returned to the residence and informed

Mr. Benedict of [Petitioner's] remarks. At that point, Mr. Benedict gave the detective consent to search the room.

Moreover, the trial court also observed that at the hearing on his motion to suppress, Petitioner asserted that he did not “deny having a possessory interest in the room,” but the trial court did “not accredit his testimony.”

Based on the foregoing, we conclude that Petitioner has failed to show any prejudice from his trial counsel's failure to file a motion to suppress in the case *sub judice*. Petitioner is not entitled to relief on this issue.

#### F. Failure to Investigate or Consult with Petitioner

Petitioner lists a number of examples in his brief which he contends are representative of trial counsel's failure to zealously represent him and which cumulatively support a finding that trial counsel's assistance was ineffective. None of the allegations of deficient conduct on the part of his trial counsel are supported by argument, legal authority, or appropriate cites to the record. Tenn. R. App. P. 27(a)(7); Tenn. R. Ct. Crim. App. 10(b). These contentions include trial counsel's failure to adequately consult with Petitioner concerning a change of venue; trial counsel's failure to appeal Petitioner's transfer from juvenile court to criminal court for trial; trial counsel's failure to file an application for permission to appeal to the Tennessee Supreme Court following this Court's affirmance of the trial court's denial of Petitioner's motion to dismiss the indictment; trial counsel's failure to consult him concerning the potential testimony of Jeffery Todd; and trial counsel's failure to request a hearing pursuant to Rule 404(b) of the Tennessee Rules of Evidence concerning Mr. Kirby's testimony that Petitioner subsequently solicited him to commit another murder. Thus, these issues are waived and afford Petitioner no relief.

Moreover, even if these allegations were addressed on the merits, Petitioner has failed to show that he was prejudiced by any error arising out of the challenged conduct. We also note that Petitioner's claim involving Mr. Kirby's testimony was raised in Petitioner's direct appeal and addressed by this Court. *State v. G'Dongalay Berry and Christopher Davis*, 2001 WL 1251240, at \*11. Issues which have been previously determined may not be raised through a post-conviction challenge. T.C.A. § 40-30-106(h).

#### G. Prosecutorial Misconduct

Petitioner contends that the prosecutor engaged in prosecutorial misconduct by soliciting “false testimony from Jeffery Todd in order to gain a conviction in this case” and by failing to disclose to Petitioner “any deals and/or grants of immunity related to some of the testifying witnesses.” This allegation, which was reflected in subsection II of Petitioner's amended petition for post-conviction relief, was withdrawn at the evidentiary hearing, and no proof was presented in support of Petitioner's allegation of prosecutorial misconduct. Accordingly, the post-conviction court did not make any findings on this contention, and the issue is thus waived.

#### H. Due Process Violation

Petitioner contends that his due process rights were violated because he alleges that he was indicted by the Davidson County Grand Jury while still a juvenile and before his transfer from juvenile court to criminal court to be tried as an adult. Petitioner conceded at the evidentiary hearing that a motion to dismiss the indictment was filed, and that this Court upheld the trial court's denial of Petitioner's motion on appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure. At the post-conviction hearing, Petitioner's counsel stated:

[w]ith regard to No. 3, the procedural due process violation, I – I do not recall, specifically, whether or not there was application made to the Tennessee Supreme Court with regard to that issue. [Petitioner] does not recall there being application made. I'm not going to have any additional proof with regard to that issue, but I would like that issue to remain as part of this Petition, although I don't intend to offer any additional evidence with regard to that.

Petitioner offered no proof at the evidentiary hearing to support his claim of a due process violation, and the post-conviction court made no findings of fact as to this issue. *See* T.C.A. § 40-30-110(f) (A petitioner has the burden of proving his allegations of fact by clear and convincing evidence). Petitioner also provided no argument and did not cite to any authority in his brief in support of his contention. Tenn. R. App. P. 27(a)(7). Thus, this issue is waived.

#### CONCLUSION

After review, we affirm the judgment of the post-conviction court.

---

THOMAS T. WOODALL, JUDGE